be drawn in reasonably compact form, even though they may be less than 50% black in voting age population.

It is significant, therefore, that when one such house district was challenged as being an unnecessary deviation from the whole county provision requirement, three North Carolina state court judges unanimously concluded that the General Assembly was justified in looking at the underlying political realities to assess whether a particular district affords minority voters an opportunity to elect candidates of choice rather than simply relying on an abstract 50% cut off. While recognizing that the Fourth Circuit Court of Appeals has ruled to the contrary, *see Hall v. Commonwealth of Virginia,* 385 F.3d 421 (4th Cir. 2004), the North Carolina state court exercised its prerogative to interpret federal law independently. The court held that "the first *Gingles* precondition for establishing a Section 2 VRA claim ... depends on the political realities present in the particular district in question, not just the raw numbers of black voters present in the general population of the district." *Pender County v. Bartlett,* App. at 35. The Court went on to explain that

> the proper inquiry is whether the black voters in the district possess the political ability, through the voting booth, to elect candidates of their own choice. As a matter of practical common sense, such an inquiry must focus on the *potential of black voters to elect representatives of their own choosing* not merely on sheer numbers alone.

Id. (emphasis in original).

House District 18, at issue in the Pender County case, currently has a total black population of 42.89% and a black voting age population of 39.36%. Blacks constitute 53.72% of the Democratic registered voters and Democrats are 59%

of the total voters in the district. Thomas Wright, an African-American, was found by the court to be unquestionably the candidate of choice of black voters in the District. Wright has repeatedly won election in the district. *Id.*, slip op. at 10-13, 22, App. at 14, 30. The evidence in the case also establishes that the North Carolina General Assembly chose to maintain House District 18 as an effectively black voting district in order to comply with its then-understanding of Section 2 of the Voting Rights Act. It was a more compact version of former House District 98 that previously was a majority-black district. *Id.*, slip op. at 8, App. at 11-12.

Therefore, North Carolina's General Assembly forged an appropriate and delicate balance between the goal of recognizing minority voting strength, where racially polarized voting would otherwise bar minority voters from being able to elect a candidate of their choice, and the goal of keeping counties whole to the extent possible in geographically compact districts. If this Court were to rule that vote dilution violates the Voting Rights Act only when minority voters have the potential to constitute 50% of a district's population, then one side of this balance will be missing. Legislators will be free, as they believed they were in Texas, to dismantle districts where minority voters have successfully elected candidates of choice, even where all of the other *Gingles* factors are present, merely because those districts do not meet an arbitrary 50% cut-off.

The North Carolina experience illustrates that, over time, as the disenfranchising effects of past official discrimination in voting are reversed — for example, by voter registration efforts that mitigate the vast disparities in white and black voter registration rates that were the legacy

of literacy tests and poll taxes in this state[11] — minorities no longer need to be 65% of the population in a district in order to have the potential to elect their candidate of choice. *See generally* Bernard Grofman, Lisa Handley, & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence,* 79 N.C. L. REV. 1383 (2001) (analyzing minority districts in the south in the 1990's and arguing that the Voting Rights Act should focus on actual election outcomes, not rigid demographic cut-offs such as 50% black population). So long as racially polarized voting operates to frustrate the voice of minority voters, there is no justification for abandoning district configurations that give minority voters the potential to elect their candidates of choice and at the same time are geographically compact and respect county boundaries merely because the percentage of black voters that is needed in such a district drops below 50%. Allowing a flexible standard to apply in determining whether a district provides black voters an opportunity to elect their candidate of choice facilitates the ability of legislatures to balance fair representation with geographic compactness and other valid redistricting criteria.

II. DISTRICTS THAT EFFECTIVELY ENABLE MINORITY VOTERS TO ELECT CANDIDATES OF THEIR CHOICE SHOULD BE PROTECTED BY SECTION 2 OF THE VOTING RIGHTS ACT

[11] *See, e.g., Gingles v. Edmisten,* 590 F. Supp. 345, 359-61 (E.D.N.C. 1984) (reviewing the current impact of official intentional race discrimination in voting in North Carolina and efforts to reverse the harm).

The original mandate of the 1982 amendments to the Voting Rights Act was for legislatures and courts to analyze whether the political processes are equally open to participation by minority voters based upon "a searching practical evaluation of the 'past and present reality.'" S. REP. NO. 97-417, at 30 (1982) (*quoting White v. Regester*, 420 U.S. 755, 769-70 (1973)). In order to be true both to the letter and to the spirit of the law, legislatures enacting redistricting plans and courts evaluating them cannot apply a simple mathematical cut-off of 50% to determine whether minority voters have the potential to elect a candidate of their choice in a particular district, especially when there is empirical evidence that, in fact, black voters have been electing their candidate of choice in that district, even though it is less than 50% black.

A bright line standard in this area is counterfactual. It is entirely possible that black voters may lack the ability to elect their candidate of choice in a district that is 56% black or may possess that ability in a district that is 43% black, depending on the circumstances. *Compare Jeffers v. Clinton*, 756 F. Supp. 1195, 1198 (E.D. Ark. 1990) *aff'd* 498 U.S. 1019 (mem.) (holding that districts that were 56% and 58% black in voting age population were not sufficient to give black voters a realistic chance to elect candidates of choice: "On a strictly numerical and quantitative view of equality, any district with a BVAP of 50% or higher would be *per se* lawful. We think the Voting Rights Act means something more than this") *with Pender County v. Bartlett*, App. at 38-39, (43% district elects a candidate of choice). *See also*, Kimball Brace, Bernard Grofman, Lisa Handley and Richard Niemi, *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 LAW AND POLICY 43 (1988) (identifying factors that impact what minority population is needed for an effective majority).

A. The First *Gingles* Precondition is a Proxy for Potential to Elect.

The three *Gingles* preconditions – geographical compactness, political cohesion, and bloc voting – are akin to standing requirements, put in place to ensure that there is both harm and a remedy: "Unless the *Gingles* preconditions are satisfied, there neither has been a wrong nor can there be a remedy." *Growe v. Emison*, 507 U.S. 25, 40 (1993); *see also Thornburg v. Gingles*, 478 U.S. 30, 50, 51 n.17 (1986). The first of these preconditions looks specifically to remedy, and asks whether the plaintiffs have the potential to elect in an alternative district. *Gingles*, 478 U.S. at 51 n.17. The *Gingles* ruling uses the term "majority" because, in the political climate in which the case then presented itself, the ability to elect was impossible absent at least a majority.[12] Indeed, the trial court in *Gingles* expressly reserved making a factual finding on "the exact population level at which blacks would constitute an effective (non-diluted) voting majority, either generally or in this area." *Gingles v. Edmisten*, 590 F. Supp. 345, 358 n.21 (E.D.N.C. 1984) (three-judge court). The trial court summarized the expert testimony on the issue, which ranged from 60% to 65%, and concluded "[o]n the uncontradicted evidence adduced we find--and need only find for present purposes--that the extant

[12] At the time, supermajorities were thought necessary to ensure blacks a reasonable opportunity to elect candidates of their choice. *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1415-16 (7th Cir. 1984) (collecting cases on this point).

55.1% black population majority does not constitute an effective voting majority, ..." *Id.* On this record, this Court in *Gingles* did not come to any different factual finding, and understandably referred to a "majority" as being necessary to elect a candidate of choice.[13]

Subsequently, this Court has refused to establish 50% as a magic parameter, assuming without deciding that potential to elect, and not majority status, is the touchstone of the first *Gingles* precondition. *See, e.g., Growe*, 507 U.S. at 40 (observing that the *Gingles* "'geographically compact majority' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district"); *see also Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (emphasizing that the *Gingles* factors "cannot be applied mechanically and without regard to the nature of the claim"); *Johnson v. DeGrandy*, 512 U.S. 997, 1008 (1994) (acknowledging that "the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice").[14]

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[13] In a concurring opinion, Justice O'Connor, with Chief Justice Burger, Justice Powell and Justice Rehnquist, noted that black voters could potentially elect candidates of their choice in districts that are less than 50% black and declined to decide whether Section 2 requires a showing that the minority group can constitute a majority in a single-member district. *Thornburg v. Gingles*, 478 U.S. at 89-90 n.1.

[14] Lower courts have recognized that *Gingles* did not attempt to establish a magic 50% parameter. *See, e.g., Martinez v. Bush*, 234 F. Supp. 2d 1275, 1322 (S.D. Fla. 2002) (three-judge court) (rejecting any approach to determine compliance with *Gingles* that would "focus[] mechanically on the percentage of minority population . . . in a particular area" in favor of ascertaining whether "the district is drawn in a manner likely to result in the election of minority candidates of choice in most elections"); *Aldasoro v. Kennerson*, 922 F. Supp. 339, 372 (S.D. Cal. 1995) (insisting that a minority group is a majority in the proposed district is "*simply one*

This was the appropriate assumption to make, and it should be explicitly endorsed in this case.

B. Minority Voters Can Sometimes Elect Their Candidates of Choice Even if They are Not a Majority in a District.

The present political realities in North Carolina are very different than they were at the time of the *Gingles* opinion. This Court has more recently recognized (although not in the § 2 context) that minority groups not a numerical majority can nevertheless elect representatives of their choice in some districts. *See, e.g., Georgia v. Ashcroft*, 539 U.S. 461, 481 (2003) (*quoting Johnson v. De Grandy*, 512 U.S. at 1020) ("there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice"). Scholars have documented this political reality as well. *See* Grofman, Handley & Lublin, *supra*, at 1407-09 (finding that a 33% minority district was an ability to elect district); Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1535-36, and 1555 (2002) (the percentage of minority voters necessary to elect a candidate of choice depends heavily on the makeup of the district). The court below in this case chose to ignore political reality, as well as this Court's precedents, and thereby failed to apply the correct legal standard.

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evidentiary method of proving an ability to elect," which should be considered together with other facts going to that ability, including, significantly, "election outcome evidence") (emphasis in original).

C. The Potential to Elect in a Coalition District Must Be Protected in Section 2 of the Voting Rights Act Just As in Section 5.

This Court should not require minority voters to meet a mechanical 50% population threshold requirement in order to establish that they have the ability to elect a candidate of choice in the context of a Section 2 analysis. To do so would put Section 2 directly at odds with Section 5 of the Act. This Court has previously established a flexible standard in *Georgia v. Ashcroft* for assessing ability to elect under Section 5. It would be illogical and unjust to impose a rigid, counterfactual standard for resolving the same factual issue to elect under Section 2 of the Act.

To be sure, the provisions of § 2 and § 5 of the Voting Rights Act differ in structure, purpose and application, and the non-retrogression inquiry under § 5 is distinct from the vote-dilution inquiry under § 2. Nonetheless, as the Court has previously held, "some parts of the § 2 analysis may overlap with the § 5 inquiry." *Ashcroft*, 539 U.S. at 478. The definition of an "ability to elect" coalitional district[15] in the retrogression analysis is surely one part of the analysis under §5 that must overlap with a § 2 dilution claim.[16] Where appropriate proof establishes that a

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[15] An ability-to-elect district (also known as a "coalitional district," "crossover district," or "performance district") is one where "minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district *in order to elect candidates of their choice.*" *Georgia v. Ashcroft*, 539 U.S. at 493 (emphasis added). In contrast, an influence district is a district where minority voters are not a majority, and *cannot elect a candidate of their choice*, but can "exert a significant--if not decisive--force in the election process." *Id.*, at 470 (emphasis added).

[16] We do not suggest that influence districts should be sufficient, under Section 2, to demonstrate vote dilution or the absence of vote dilution

district that is less than fifty percent minority can afford minorities the ability to elect candidates of choice, it does not matter whether a redistricting plan is being reviewed under § 5 of the Voting Rights Act or subjected to a challenge under § 2.

The Supreme Court of New Jersey recently reached this same conclusion. *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840, 853 (N.J. 2003), *cert. denied*, 540 U.S. 1107, 157 L. Ed. 2d 893 (2004) (relying on the reasoning in *Georgia v. Ashcroft* to conclude that a district in which minorities are able to elect preferred candidates, even if the district is not a majority-minority district, is sufficient to sustain a § 2 claim). In New Jersey, plaintiffs objected to a legislative districting plan that created a third minority district (though less than fifty percent minority) because the plan failed to preserve municipal boundaries as required by the New Jersey Constitution. The New Jersey Supreme Court concluded that preserving municipal boundaries would result in vote dilution and violate the Voting Rights Act: "[t]he *Supremacy Clause* interdicts that result." *McNeil*, 828 A.2d at 854. This Court denied certiorari in *McNeil*.

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because there is no clear definition of an influence district. *See, Arizona Minority Coalition for Fair Redistricting v. Arizona Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 904-05 (D. Ariz. 2005) (influence claims "have no standards and would be judicially unmanageable"). *See also* Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000's*, 80 N.C. L. REV. 1517, 1539-40 (2002) (influence districts are "nebulous and difficult to quantify" whereas ability-to-elect districts, which require the ability to elect, are defined by actual electoral outcomes). Moreover, a rejection of influence district claims does not imply a rejection of ability-to-elect district claims. *See, e.g., Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 378, 382-404 (S.D.N.Y. 2004) (refusing to recognize influence dilution claims, yet analyzing the merits of plaintiffs' ability-to-elect district claim), *aff'd mem.*, No. 04-218 (Nov. 29, 2004).

Although *Ashcroft* was decided in the context of § 5 litigation, commentators and courts immediately recognized that the Court's reasoning should extend to § 2 cases as well. *See The Supreme Court, 2002 Term: Leading Cases*, 117 HARV. L.REV. 469, 474 (November, 2003); Note, *The Implications of Coalitional and Influence District for Voter Dilution Litigation*, 117 HARV. L. REV. 2598, 2619 (2004); *McNeil*, 828 A.2d at 851. If coalition districts give minority voters the opportunity to elect candidates of their choice when assessing a redistricting plan under § 5's retrogression standard, the same voters must be able to bring a § 2 claim when an existing and proven coalition district is eliminated by a redistricting plan.

CONCLUSION

As North Carolina's experience illustrates, minority voters can have the opportunity to elect their candidates of choice in districts where they are less than 50% of the population even where polarized voting is substantial. If all of the other *Gingles* factors are met, and especially when the ability to elect in the coalition district is proven by past election results, then destroying the coalition district violates Section 2 of the Voting Rights Act. Other legitimate and valuable redistricting goals can best be balanced with the need to provide fair representation for minority voters when Section 2 of the Voting Rights Act protects districts providing the ability to elect where minority voters are less than 50% of the district's population. The Court should reject the legal standard applied in this case by the court below, and clarify and endorse the assumptions that have underpinned the past thirty years of this Court's Voting Rights Act jurisprudence.

Respectfully submitted,

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January 10, 2006

APPENDIX

NORTH CAROLINA: IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY: 04 CVS 0696

PENDER COUNTY, et al.,
Plaintiffs,

v.

GARY O. BARTLETT, as Executive Director of the State Board of Elections, et al.,
Defendants.

MEMORANDUM OF DECISION AND ORDER RE: SUMMARY JUDGMENT

THIS MATTER is before the Court upon plaintiffs' ("Pender County") and defendants' ("BOE") cross motions for summary judgment pursuant to Rule 56, North Carolina Rules of Civil Procedure. Pender County seeks permanent injunctive relief to forbid the use of House districts 16 and 18 as currently constituted under the North Carolina General Assembly's November 25, 2003, legislative redistricting plan.

Procedural Background

This case was instituted on May 14, 2004, by the filing of a complaint in the Superior Court of Wake County. The subject matter of the case involves a legal challenge by Pender County and the other named plaintiffs to portions of the N.C. House of Representatives' legislative redistricting plan adopted by the North Carolina General Assembly on November 25, 2003.

Pender County has been divided between two House Districts in the 2003 Redistricting Plan. Pender County contends that this division violates the Whole County Provision (WCP) of the North Carolina Constitution as defined in ***Stephenson v. Bartlett, 355 N.C. 354*** (2002) (***Stephenson I***) and ***Stephenson v. Bartlett, 357 N.C. 301*** (2003) (***Stephenson II***).

N.C.G.S. 1-267.1 requires that lawsuits seeking to challenge legislative redistricting plans be filed in the Superior Court of Wake County and that such challenges be heard by a Three-Judge Panel appointed by the Chief Justice of the State of North Carolina.

Chief Justice I. Beverly Lake, Jr., signed an Order dated May 24, 2004, appointing the Three-Judge Panel for Redistricting Challenges as defined in G.S. 1-267.1 to hear and determine the action challenging that portion of the 2003 Legislative Redistricting Plan relating to House seats in North Carolina House Districts 16 and 18 (Pender and New Hanover Counties).

The BOE filed an Answer on June 4, 2004, asserting as one of many defenses, that the division of Pender County into two House districts was required by federal law, the supremacy of which under the federal and state constitutions was specifically acknowledged in ***Stephenson I and II.***

The BOE contended that House District 18 was drawn for the purpose of providing black voters in Pender and New Hanover Counties an equal opportunity to elect a

candidate of their choice in order to comply with Section 2 of the Voting Rights Act ("VRA").

On June 11, 2004, Pender County filed a motion for preliminary injunction and motion for summary judgment on permanent injunction seeking to enjoin the defendants from proceeding with primary and general elections for the 16th and 18th North Carolina House Districts as they now exist under the November 25, 2003, legislative redistricting plans adopted by the North Carolina General Assembly.

The Three-Judge Panel scheduled a hearing on the motion for preliminary injunction for Friday, June 25, 2004. The parties submitted affidavits, stipulations of fact, and memoranda of law several days prior to the hearing on the motion for preliminary injunction.

The hearing was held as scheduled on June 25, 2004. The Three-Judge Panel advised that it would only consider the issue of whether or not a preliminary injunction should issue to stop the election process. The parties made oral arguments and the Three-Judge Panel recessed for two hours to consider the matter. The Three-Judge Panel reconvened to announce its unanimous decision in open court and denied the motion for preliminary injunction. A written summary of the decision was provided to the parties, filed with the Clerk of Superior Court of Wake County and provided that a written order would follow in due course.

There was no request from the parties for findings by the Three-Judge Panel pursuant to Rule 52, North Carolina Rules of Procedure and thus findings of fact and conclusions of law are not required when a motion for preliminary injunction is denied. The Three-Judge Panel entered its Order denying Pender County's motion for preliminary injunction in September, 2004.

On February 25, 2005, the parties filed cross motions for summary judgment. Thereafter, the parties filed Stipulations of Fact and Amended Stipulations of Fact (April 27, 2005) together with briefs and reply briefs in support of their respective positions.

On July 14, 2005, the Three-Judge Panel noticed the motions for summary judgment for hearing on Tuesday, August 30, 2005. On August 30, 2005, the parties presented their arguments before the Three-Judge Panel and the Panel took the motions under advisement. The Panel has now had the time to review and consider the Amended Stipulations of Fact, the arguments, memoranda of law, and the record in this case. This matter is ripe for disposition.

At the outset, the Court will address the issue as to whether or not Pender County, acting through its duly elected County Commissioners, can sue the State of North Carolina over its legislatively adopted Redistricting Plan.

The Court notes that this action is brought on behalf of Pender County by Pender County Commissioners Strickland, Williams, Rivenbark, Holland and Meadows, both individually and in their official capacities as county commissioners. The BOE defendants are sued in their official capacities, and not as individuals, as Executive Director of the State Board of Elections, Members of the State Board of Elections, the then Co-Speakers of the North Carolina House of Representatives, the President Pro-Tempore of the North Carolina Senate, the Governor of the State of North Carolina and the Attorney General of the State of North Carolina. Thus, in effect, by commencing this action against the heads of the Executive and Legislative Branches and the State Board of Elections in their official capacities, Pender County has sued those branches of the government of the State of North Carolina and the agency responsible for executing the legislation at issue.

Pender County, a municipal corporation, is a political subdivision of the State of North Carolina and can only exercise those municipal powers that have been granted to it by the legislature. ***Jones v. Commissioners, 137 N.C. 579,596 (1905); Bowers v. City of High Point, 339 N.C. 413,417 (1994); Homebuilders Ass'n of Charlotte, 335 N.C. 37,41-42 (1994).***

For over 100 years North Carolina followed the narrow rule of common law known as "Dillon's Rule" which provided that:

> A municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential for the accomplishment of the declared objects and purposes of the corporation – not simply convenient, but indispensable. ***Bellsouth Telecommunications, Inc. v. City of Laurinburg, 168 N.C. App. 75(2005).***

Dillon's Rule has been broadened by the General Assembly by the enactment of N.C.G.S. 160A-4, in order to make it clear that the provisions of Chapter 160A of the General Statutes of North Carolina, which pertains to cities and towns, shall be broadly construed to include any additional and supplementary powers that are reasonably necessary and expedient to carry them into effect. Bellsouth Telecommunications, supra. However, nowhere in this statute does the legislature give to cities and towns the authority to sue the State of North Carolina.

This Court is unaware of any statute that authorizes a county to file a civil action against the State of North Carolina to challenge the constitutionality of a redistricting statute enacted by the General Assembly of North Carolina. See discussion in ***Appeal of Martin, 286 N.C. 66, at 73-74 (1974)***, wherein the Supreme Court held that a county did have standing to challenge the constitutionality of a statute limiting its taxing power. Furthermore, the concept underlying Dillon's Rule is recognized nationally. ***Coleman v. Miller, 307 US 433 (1939).***

Therefore, the Court holds that Pender County, and its County Commissioners acting in their official capacities, have no standing to bring this action, and they will be dismissed. This does not, however, end the case as the individual claims of Strickland, Williams, Rivenbark, Holland and Meadows as they, as individual private citizens and voters of Pender County, have standing to sue to seek redress from allegedly unconstitutional action by the BOE in the enactment and execution of the 2003 Legislative Redistricting Plan for the House of Representatives.

Resolving the issue of standing, however, does not resolve the case. Accordingly, the Court will address the merits of the claim. To that end, pertinent stipulations of fact and other undisputed facts of record follow:

FACTUAL BACKGROUND

I. THE NORTH CAROLINA GENERAL ASSEMBLY

1. The North Carolina General Assembly consists of the Senate and the House of Representatives. N.C. CONST. art. II, Section 1. Members of both the Senate and the House of Representatives are elected for two-year terms. N.C.

CONST. art. II, Sections 2 and 4. The North Carolina House of Representatives has 120 members. The North Carolina Senate has 50 members.

2. Pursuant to the decisions of the North Carolina Supreme Court in ***Stephenson I*** and ***Stephenson II***, in 2002 and 2004 these 120 house members were elected from 120 single-member districts. The terms of the members elected in 2002 commenced on January 1, 2003, and the terms of the members elected in 2004 commenced on January 1, 2005.

3. At the time of redistricting in 1981 and 1982, there were 3 African-Americans serving in the House. After the 1982 redistricting, 11 African-Americans served in the House in 1983. After the ***Gingles*** litigation and redistricting, 13 African-Americans served in the House in 1985 and in 1987; and 14 served in 1989. The names of the African-American Representatives and the districts they represented are contained in Exhibit F. Of the 120 members of the 1991 House, 81 were Democrats and 39 were Republicans; 105 were white, 14 were African-American, and 1 was a Native American.

4. After the 1991 redistricting, of the 120 members of the 1993 House, 78 were Democrats and 42 were Republicans; 101 were white, 18 were African-American, and 1 was a Native American.

5. Of the 120 members of the 1995 House, 52 were Democrats and 68 were Republicans; 102 were white, 17 were African-American, and 1 was a Native American.

6. Of the 120 members of the 1997 House, 59 were Democrats and 61 were Republicans; 102 were white, 17 were African-American, and 1 was a Native American.

7. Of the 120 members of the 1999 House, 66 were Democrats and 55 were Republicans; 102 were white, 17 were African-American, and 1 was a Native American.

8. Of the 120 members of the 2001 House, 62 were Democrats and 58 were Republicans; 101 were white, 18 were African-American, and 1 was a Native American.

9. After the 2001 and 2002 redistricting and elections under the Jenkins Plan ("Interim House Plan" drawn by Judge Jenkins and in effect for the 2002 election), of the 120 members of the 2003 House, 60 or 61 were Democrats and 59 or 60 were Republicans (the fluctuation in numbers being to due to a representative who changed party affiliation twice during the 2003 session); 101 were white, 18 were African-American, and 1 was a Native American.

10. After election under the legislature's 2003 Plan, of the 120 members of the current 2005 House, 63 are Democrats and 57 are Republicans; 100 are white, 19 are African-American, and 1 is a Native American.

II. REDISTRICTING SINCE 1982 AS IT HAS AFFECTED PENDER COUNTY

11. In the House redistricting plan enacted in 1982 and modified in response to ***Gingles***, which remained in effect until the 1992 elections, Pender County was divided between two districts: District 12, which also included Sampson and Bladen counties, and District 14, which also included Brunswick County and a portion of New Hanover County.

12. In the 1992 Plan, which remained in effect until the 2002 elections, Pender County was divided between three districts: District 12, which included portions of Pender, and Sampson counties; District 96, which included portions of Pender, Bladen, Cumberland and Sampson counties; and District 98, which included portions of Pender, Brunswick, Columbus and New Hanover counties. District 98 was identified by the General Assembly as a VRA

district; it had a total black population of 59.26% and a black voting age population of 55.72%, based on the 1990 Census. Based on the 2000 Census, District 98 had a total black population of 50.70% and a black voting age population of 47.07%.

Disaggregated Data for District 98 Using 2000 Census Data

13. District 98 elected Representative Wright in 1992, 1994, 1996, 1998, and 2000. Using the 2000 Census data, District 98 had a voter registration total of 38,998. Of this number, Democratic voters comprised 62.53%, Republican voters comprised 22.21%, and Unaffiliated voters comprised 14.99%. The percentage of black Democratic voters was 53.37% as compared to 43.73% white. Since black Democratic voters constituted the majority of Democrats in District 98, Representative Wright had the obvious edge over a white Democratic challenger in any primary for House Seat in District 98. The election results for 1992, 1994, 1996, 1998 and 2000 in District 98 are the proof in the pudding that a black Democrat had the best chance of winning a House seat because he or she could win the Democratic primary and face a General Election minority of Republican (22.21%) and/or combination of unaffiliated voters (14.99%) whose combined total was less than 38% of the registered voters in the district. That is, if a Republican attempted to run in the first place. In the General Election, the Democratic registered voters, without regard to race, made up **62.53%** of the total voters in District 98. The General Assembly created District 98 as a VRA district and Representative Wright continually won re-election as a result.

14. In the 2001 Plan (Sutton House Plan 3), Pender County was divided between five districts: District 13, which included portions of Pender, Carteret, Craven and Onslow counties; District 15, which included portions of Pender, New Hanover and Onslow counties; District 18, which included portions of Pender, Brunswick, Columbus and New Hanover Counties; District 19, which included portions of Pender, Bladen, Cumberland, New Hanover and Sampson counties; and District 20, which included portions of Pender, Johnston and Sampson counties. District 18, which included Representative Wright's residence, was identified by the General Assembly and the courts as a VRA district; it had a total black population of 44.00%, a black voting age population of 40.38%. There was no election conducted for District 18 as drawn under Sutton House Plan 3 and the record contains no disaggregated data relating to the number of black registered voters by party affiliation. Democratic registered voters did constitute 62.36% of the proposed district and there were 15,594 black registered voters located in that district.

North Carolina's Section 5 Submission for 2001 House Redistricting Plan (Sutton 3) to the USDOJ for Preclearance under Section 5 of the VRA. (Exhibit 0)

15. The State of North Carolina is required to submit its Redistricting Plan to the USDOJ as 40 of its counties are subject to Section 5 of the VRA. Portions of the Sutton 3 Plan submission follow as Sutton 3 related to House District 18, the present District (although redrawn) which is challenged in this action. Excerpts follow:

> ***The effect of the adoption of Sutton 3 on North Carolina's minority voters is to maintain, in the face***

of changed demographics and changed federal law, the opportunity of minority voters to elect representatives of their choice.

The 1992 plan, based on 2000 Census data, contained 14 majority-black House districts, 10 of which (District 5,7,8,26,70,78,79,87,and 97) included Section 5 counties. Three other majority-black districts (Districts 21 in Wake, 59 in Mecklenburg, and 66 in Forsyth) were in non-Section 5 counties but counties that were the subject of section 2 litigation in Gingles, which required the drawing of single member black districts. Another majority-black district, District 98, is located in four non Section 5 counties in southeastern North Carolina and was drawn as a result of objections by the U.S. Department of Justice during Section 5 preclearance review in 1991. (At the time, preclearance review also included review under Section 2 principles).....

In addition, Sutton 3 resulted in three non-Section 5 districts which, though less than 50% black in total population, nonetheless have at least 40% black total population and afford black voters a strong likelihood of being a dominant political force able to elect representatives of their choice. Those districts are as follows:

District 18 (the equivalent of District 98 in the previous plan) –Parts of Brunswick, Columbus, New Hanover and Pender counties (all non Section 5)..... This district was drawn as a majority black district in 1992 in non-Section 5 counties in

response to an objection interposed during Section 5 preclearance that said minority voting strength was not being recognized sufficiently in southeastern North Carolina. The preclearance policies which resulted in those objections subsequently led to the U.S. Supreme Court's decision in Shaw v. Reno and related cases. After Shaw , former district 98's non-compact configurations raised questions regarding the predominance of race in the district's design and narrow tailoring. The proposed District 18 is a more compact district with a black percentage of 44%. The black percentage of Democratic voter registration is 53.04% in the new district and the chart ..... shows Democratic nominees in the district winning victories of more than 65% without regard to race.

When Sutton 3 received its final approval in the House of Representatives on November 1, 2001, every minority member of the House of Representatives voted "Yes." When it received final approval in the Senate November 13, all the minority Senators who were present voted "Yes."

16. In the 2002 Plan (Sutton House Plan 5), Pender County was in a single district - District 16 - which also included a portion of New Hanover County. District 16 was not identified by the General Assembly as a VRA district. District 18, that included portions of three counties (Brunswick, Columbus and New Hanover), was identified by the General Assembly and the courts as a VRA district. District 18 had a total black population of 44.00% and a black voting age population of 40.41%.

There was no election conducted for District 18 as drawn under Sutton House Plan 5 and the record contains no disaggregated data relating to the number of black registered voters by party affiliation. Democratic registered voters did constitute 61.74% of the proposed district and there were 19,429 black registered voters located in that district.

17. ***North Carolina's Section 5 Submission for 2002 House Redistricting Plan (Sutton 5) to the USDOJ for Preclearance under Section 5 of the VRA.*** (Exhibit P)- Relating to District 18.

Because forty (40) North Carolina counties are subject to Section 5 of the VRA, the 2002 redistricting plan was subject to review by the United States Attorney General. Once again, the State of North Carolina submitted its entire redistricting plan for the House of Representatives to the USDOJ for Section 5 review. The plan was "pre-cleared" by the USDOJ on March 30, 2004, and there was no objection under Section 5 of the VRA. Excerpts follow:

> ***In addition, Sutton 5 Corrected resulted in four non-Section 5 districts which, though less than 50% black in total population, nonetheless have at least 40% black population and afford black voters a strong likelihood of being a dominant political force able to elect representatives of their choice. Those districts are as follows:***
> **** District 18(the equivalent of District 98 in the 1992 plan) –Parts of Brunswick, Columbus and New Hanover, counties (all non-section 5). ..... The proposed District 18 is a more compact district with a black percentage of 44%. The 2002 reconfiguration additionally attempts to comply with the Stephenson decision by containing the district***

within three rather than four non-Section 5 counties, allowing Pender County to be undivided. The black Democratic voter registration is 51.71% in the 2002 district and the chart..... Shows statewide Democratic nominees in the district winning victories of more than 60% without regard to race. Rep. Thomas Wright, black legislator who has represented District 98 since 1992..... voted for Sutton 5.

..... Statewide, Sutton 3, resulted in a set of districts that reasonably maintains the position of racial minorities with respect to their effective exercise of the electoral franchise. Sutton 5 Corrected preserves the same pattern.

18. In the Jenkins Plan (Interim House Plan), Pender County was in a single district identified as District 16 that also included a portion of New Hanover County. District 16 was not identified by Judge Jenkins as a VRA district. However, District 18, that included portions of three counties (Brunswick, Columbus and New Hanover), was identified by Judge Jenkins as a VRA district; it had a total black population of 46.99% and a black voting age population of 43.44%.

The Attorney General of the United States interposed no objections and pre-cleared the Jenkins Plan under Section 5 of the VRA on July 12, 2002.

Disaggregated Data for Jenkins District 18 Using 2000 Census Data

District 18 elected Representative Wright in 2002. Using the 2000 Census data, District 18 had a voter

registration total of 40,450. Of this number, Democratic voters comprised 64.31%, Republican voters comprised 20.77%, and Unaffiliated voters comprised 14.65%. The percentage of Democratic voters that were black was 52.58 as compared to 44.08 white. Since black Democratic voters constituted the majority of Democrats in District 18, Representative Wright held obvious edge over any white Democratic challenger in any primary for House Seat in District 18. The election results for 2002 in District 98 are the proof in the pudding that Representative Wright, a black Democrat had the best chance of winning a house seat because he won win the party primary, if one was held, and face a General Election minority of Republican (20.77%) and/or combination of unaffiliated voters (14.65%) whose combined total was less than 32% of the registered voters in the district. That is, if a Republican attempted to run in the first place. In the General Election, the Democratic registered voters, without regard to race, made up **64.31%** of the total voters in District 18. Judge Jenkins created District 18 as a VRA district and Representative Wright won re-election as a result.

19. In the 2003 Plan, Pender County was divided between two districts - Districts 16 and 18 - both of which also contained portions of New Hanover County. District 18 was identified by the General Assembly as a VRA district, purportedly drawn to comply with the provisions of Section 2 of the Voting Rights Act. District 18 has a total black population of 42.89%, a black voting age population of 39.36% and black Democratic registration of 53.72%. Representative Wright resides in District 18.

Disaggregated Data for 2003 House Plan District 18 Using 2000 Census Data

Using the 2000 Census data, District 18 had a voter registration total of 38,850. Of this number, Democratic voters comprised 59.01%, Republican voters comprised 23.99%, and Unaffiliated voters comprised 16.57%. The percentage of Democratic voters that are black was 53.72% as compared to 44.96% white. Since black Democratic voters constituted the majority of Democrats in District 18, Representative Wright had the obvious edge over a white Democratic challenger in any primary for House Seat in District 18. The election results for 2004 in District 98 are the proof in the pudding that Representative Wright, a black Democrat had the best chance of winning a House seat because he would win the party primary, if one was held, and face a General Election minority of Republican (23.99%) and/or combination of unaffiliated voters (16.57%) whose combined total was less than 41% of the registered voters in the district. That is, if a Republican attempted to run in the first place. In the General Election, the Democratic registered voters, without regard to race, made up 59.01% of the total voters in District 18. Representative Wright won re-election in 2004 in District 18. He had no primary opposition and no Republican opposition in the General Election. It appears from this that Thomas Wright is clearly the candidate of choice of black voters in District 18 as presently constituted.

20. ***North Carolina's Section 5 Submission for 2003 House Redistricting Plan (Sutton 5) to the US District Court for the District of Columbia for Preclearance under Section 5 of the VRA.*** (Exhibit Q)- Relating to District 18. Again, because forty (40) North Carolina counties are subject to Section 5 of the VRA, the 2003 redistricting plan was subject to review by the United States Attorney General. Once again, the State of North Carolina submitted its entire redistricting plan for the House of Representatives to the USDOJ for Section 5 review. The plan was "pre-cleared" by

the USDOJ on March 30, 2004, and there was no objection under Section 5 of the VRA. Excerpts follow:

> ***Minority Voting Strength Statewide***
> ***The 2003 House Redistricting Plan's lack of discriminatory or retrogressive intent is further demonstrated by the plan's attention to minority voters throughout the state in non-Section 5 counties as well as areas covered by Section 5. Statewide, the 2003 House Redistricting Plan maintains or increases the overall electoral strength and effectiveness of minority voters based on the number of districts with black populations of over 50%, over 40% and over 30% as follows: (Chart omitted)..... The 2003 House Redistricting Plan, in areas not covered by Section 5, includes five majority-black (BPOP) districts:..... There are four over 40% black (BPOP) districts: Districts 72, 18, 29 and 31. Based on the minority populations and past election results, these nine districts can be expected to continue to elect at least eight black Representatives.***
> ***Past election results in North Carolina demonstrate that districts with a black voting age population (BVAP) of 37.81% and above can provide an effective opportunity for the election of black candidates..... In North Carolina, a more important indicator of effective black voting strength is the percentage of registered Democrats who are black. The profiles of districts in the court-drawn 2002 Interim Plans which have elected black representatives ..... run from a low of 52.58% in District 18 to a high of 78.87% in District 60. (emphasis added)***

With the foregoing factual background in mind, the Court will now discuss the major issue framed by the parties.

DISCUSSION

The parties to this action have gone to great lengths to frame the major issue before this Court as follows:

Is the present configuration of House District 18 required by Section 2 of the Voting Rights Act?

Pender County frames the issue in its Memorandum in Support of Motion for Summary Judgment and Permanent Injunction thus:

> ***Under Article II, Section 5(3) of the North Carolina Constitution and the holdings in Stephenson I and II, Pender County should be placed in a single house district unless federal law requires otherwise. Based on the answer filed by Defendants, the only contested legal issue appears to be whether Section 2 of the Voting Rights Act (42 U.S.C. 1973) requires that Pender County be split. The controlling case law on this point is abundantly clear that Pender County need not be split in order to abide by Section 2 of the VRA. (Memorandum page 8, 2/25/05)***

The BOE frames the issue in its Brief in Support of Defendant's Motion for Summary Judgment thus:

> ***In the 2003 House Plan, which only divides 47 of North Carolina's 100 counties, this included the drawing of House District 18 to comply with Section***

2 of the Voting Rights Act. Specifically, District 18, a district first drawn (as former District 98) to comply with Section 2 in 1992, was drawn in its current form so that it continued to offer minorities in that part of the State the opportunity to elect a candidate of choice; otherwise the State would be vulnerable to a Section 2 Voting Rights Act claim. (Brief, page 6, 3/8/05)

Because of the developing law regarding Section 2 of the Voting Rights Act, the North Carolina General Assembly had a reasonable basis to believe that federal law required drawing House District 18 so that it continued to offer minorities in the southeastern part of the state the opportunity to elect a candidate of choice; otherwise the State would be vulnerable to a Section 2 Voting Rights Act claim. (Brief page 30, 3/8/05)

At the outset, the Court notes that it is not "bound or hog-tied" by the issues as framed by the parties. The Court's responsibility is to review House District 18 as drawn by the General Assembly under the 2003 House Redistricting Plan and to determine, based on the evidence presented, whether or not House District 18 was drawn in violation of the North Carolina Constitution and the tenets set forth in ***Stephenson I, Stephenson II*** and the applicable federal law.

In ***Stephenson I***, the Supreme Court stated:

On remand, to ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. The USDOJ precleared the 2001 legislative redistricting

plans and the VRA districts contained therein, on 11 February 2002. This administrative determination signified that, in the opinion of the USDOJ, the 2001 legislative redistricting plans had no retrogressive effect upon minority voters. In the formation of VRA districts within the revised redistricting plans on remand, ***we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters.*** *To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP as herein established for all redistricting plans and districts throughout the State.* ***(emphasis added) 355 N.C. 383***

House District 18, as presently and previously drawn, was denominated by Judge Jenkins and the General Assembly as a VRA District. House District 18, as were its predecessors in all of the redistricting plans since 1992, is a single member district. Since present House District 18 and its predecessor Districts were not located in Section 5 VRA counties, House District 18 was identified as a VRA district under Section 2 of the VRA.

It is undisputed that the North Carolina General Assembly, with the consent of Representative Wright, wanted to maintain House District 18 as an effective black voting district so as to avoid a challenge under Section 2 of the VRA in the event the redistricting plan failed to contain an effective black voting district in the southeastern portion of North Carolina similar to former House District 98.

While the General Assembly and its redistricting plan must be given great deference, the intent to create a Section 2 VRA district to comply with federal law and the

designation of House District 18 as a Section 2 VRA district does not, in and of itself, answer the question presented. House District 18 must be, in fact and in law, a Section 2 VRA district.

As a result, this Court must look to the United States Supreme Court for guidance relative to the requirements and limitations of Section 2 VRA districts.

This Court recognizes that ***Thornburg v. Gingles, 478 U.S. 30, 92 L. Ed. 2d, 25, 114 S. Ct. 2647 (1986),*** is the seminal decision on Section 2 claims under the VRA involving multi-member districts. Since ***Gingles*** there have been a number of cases that have discussed and refined issues relating to Section 2 claims in single-member districts, which is what House District 18 is relative to the ***Gingles*** decision.

Accordingly, pertinent parts of those Supreme Court Cases follow:

Growe v. Emison, 507 U.S. 25, 122 L. Ed. 2d 388 (1993).

In this case, the United States Supreme Court addressed a Section 2 VRA claim as applied to a single member district and required that the ***Gingles*** threshold factors apply to a Section 2 VRA claim of vote dilution affecting a single-member district as well as to a multimember district.

> *Our precedent requires that, to establish a vote-dilution claim with respect to a multimember districting plan (and hence to justify a supermajority districting remedy), a plaintiff must prove three threshold conditions:*
> *First, 'that [the minority group] is sufficiently large and geographically compact to constitute a majority*

*in a single member district'; second, 'that it is politically cohesive'; and third, ' that the white majority votes sufficiently as a bloc to enable it.... usually to defeat the minority's preferred candidate.' **Gingles, 478 U.S., at 50-51, 92 L. Ed. 2d, 106 S. Ct. 2752**. We have not previously considered whether these Gingles threshold factors apply to a Section 2 dilution challenge to a single member districting scheme, a so called "vote fragmentation" claim. See id., at 46-47, n. 12, 92 L. Ed. 2d 25,106 S. Ct. 2752. We have, however, stated on many occasions that multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts. (citations omitted)- which is why we have strongly preferred single-member districts for federal-court-ordered reapportionment. (citations omitted) It would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single member district. Certainly the reasons for the three Gingles prerequisites to continue to apply:* **The *"geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of it own choice in some single-member district see Gingles, supra, at 50, n. 17, (other citations omitted). And the "minority political cohesion" and " majority bloc voting" showings are needed to establish that the challenged district thwarts a distinctive minority vote by submerging it in a larger white voting population. (citation omitted). Unless these points***

***are established, there neither has been a wrong nor can be a remedy.* (emphasis added) 507 U.S. 39-41**

Voinovich v. Quilter, 507 U.S. 146 (1993).

Voinovich followed on the heels of ***Crowe. Voinovich*** considered whether or not Ohio's creation of several legislative districts dominated by minority voters violated Section 2 of the VRA. ***Voinovich*** is instructive on two fronts: first, for purposes of understanding the application of Section 2 to single-member districts and second, for its discussion of the power of the States in deciding their own legislative reapportionments.

> *Section 2 thus prohibits any practice or procedure that, "interact[ing] with social and historical conditions," impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters. (citation omitted).*

A.

> *In the context of single-member districts, the usual device for diluting minority voting power is the manipulation of district lines. A politically cohesive minority group that is large enough to constitute the majority in a single member district has a good chance of electing its candidate of choice, if the group is placed in a district where it constitutes a majority. Dividing the minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice: If the majority in each district votes a bloc against the minority candidate, the fragmented minority group*

will be unable to muster sufficient votes in any district to carry its candidate to victory.

This case focuses not on the fragmentation of a minority group among various districts but on the concentration of minority voters within a district. How such concentration or "packing" may dilute minority voting strength is not difficult to conceptualize. A minority group, for example, might have sufficient numbers to constitute a majority in three districts. So apportioned, the group inevitably will elect three candidates of its choice, assuming the group is sufficiently cohesive. But if the group is packed into two districts in which it constitutes a super-majority, it will be assured only two candidates. As a result, we have recognized that "[d]ilution of racial minority group voting strength may be caused" either "by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority."
507 U.S. 153-154

The practice challenged here, the creation of majority-minority districts, does not invariably minimize or maximize minority voting strength. Instead, it can have either effect or neither. On the one hand, creating majority-black districts necessarily leaves fewer black voters and therefore diminishes black-voter influence in predominantly white districts. On the other hand, the creation of majority-black districts can enhance the influence of black voters. ***Placing black voters in a district in***

which they constitute a sizeable and therefore "safe" majority ensures that they are able to elect their candidate of choice. *Which effect the practice has, if any at all, depends entirely on the facts and circumstances of each case.* ***(emphasis added.) 507 U.S. 154-155***

Section 2 contains no per se prohibitions against particular types of districts: It says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based on partisan political concerns. Instead, Section 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the ***effect*** *of denying a protected class the equal opportunity to elect its candidate of choice does it violate Section 2; where such an effect has not been demonstrated, Section 2 simply does not speak to this matter. See 43 USC 1973(b). .....*

The District Court's decision was flawed for another reason. By requiring the appellants to justify the creation of the majority-minority districts, the District Court placed the burden of justifying apportionment on the State. Section 2, however, places at least the initial burden of proving an apportionment's invalidity squarely on the plaintiff's shoulders. Section 2(b) specifies that 2(a) is violated if "it is shown" that a state practice has the effect of denying a protected group equal access to the electoral process. (citation omitted) The burden of "show[ing]" the prohibited effect, of course, is on the plaintiff; surely Congress could not have intended the State to prove the invalidity of its own

*apportionment scheme. See Gingles, 478 U.S. 46 (citations omitted) (plaintiffs must demonstrate that the device results in unequal access to the electoral process)..... **507 U.S. 155,156***

*Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. See Growe, ante at 40-41 (citations omitted). **But that does not mean that the State's powers are similarly limited. Quite the opposite is true: Federal Courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place. Time and again we have emphasized that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." Growe,ante,at 34(citations omitted). 507 U.S. 156.....***

Had the District Court employed the Gingles test in this case, it would have rejected appellees' Section 2 claim. Of course, the Gingles factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first Gingles precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume, arguendo, to be actionable today. The complaint in such a case is not that black voters have been deprived of the ability to constitute a majority,

but of the possibility of being a sufficiently large minority to elect the candidate of their choice with the assistance of cross over votes from the white majority. We need not decide how Gingles first factor might apply here, however, because appellees have failed to demonstrate Gingles' third precondition – sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The District Court specifically found that Ohio does not suffer from "racially polarized voting". 794 F. Supp. at 700-701. (citations omitted)

Here, as in Gingles, "in the absence of significant white block voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." Gingles, 478 U.S. at 49, n. 15. ..... The District Court's finding of a Section 2 violation, therefore, must be reversed. ***507 U.S. 158.***

Shaw v. Hunt, 517 U.S. 899, 135 L. ED. 2d 207 (1996).

This case involves the infamous North Carolina U.S. House District 12, sometimes known as the "chicken district" that ran east and west along Interstate 85. House District 12 was formed in response to the USDOJ's objections to North Carolina's 1991 Congressional Redistricting Plan under **now unenforceable** Attorney General regulations which required preclearance under Section 5 VRA review be withheld if there were Section 2 problems in the proposed redistricting plan.

With respect to Section 2, appellees contend, and the District Court found, that failure to enact a plan with

a second majority-black district would have left the State vulnerable to a lawsuit under this section. Our precedent establishes that a plaintiff may allege a Section 2 violation in a single-member district if the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority. (citations omitted). To prevail on such a claim, a plaintiff must prove that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; that the minority group "is politically cohesive"; and that "the white majority votes sufficiently as a bloc to enable it ...usually to defeat the minority's preferred candidate." Thornburg v. Gingles, 478 U.S. 30,50-51 (1986); Growe v. Emison, 507 U.S. 25 (1993) (citations omitted) A court must also consider all other relevant circumstances and must ultimately find based on the totality of those circumstances that members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their own choice. [42 USC 1973(b)]." ***517 U.S. 914***

We assume, arguendo, for purpose of resolving this suit, that compliance with Section 2 could be a compelling interest, and we likewise assume, arguendo, that the General Assembly believed a second majority-minority district was needed in order not to violate Section 2, and that the legislature at the time it acted had a strong basis in evidence to support that conclusion. ***517 U.S. 915***

Where, as here, we assume avoidance of Section 2 liability to be a compelling state interest, we think that the racial classification would have to realize that goal; the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored.

District 12 could not remedy any potential Section 2 violation. As discussed above, a plaintiff must show that the minority group is "geographically compact" to establish Section 2 liability. No one looking at District 12 could reasonably suggest that the district contains a "geographically compact" population of any race. Therefore where that district sits, "there neither has been a wrong nor can be a remedy." Growe, supra, at 41. .....

If a Section 2 violation is proved for a particular area, it flows from the fact that individuals in this area "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 42 USC 1973(b). The vote dilution injuries suffered by these persons are not remedied by creating a safe majority black district somewhere else in the State. For example, if a geographically compact, cohesive minority population lives in southeastern North Carolina, as the Justice Department's objection letter suggested, District 12 that spans the Piedmont Crescent would not address that Section 2 violation. The black voters of south-central to southeastern region would still be suffering precisely the same injury that they suffered before District 12 was

formed. District 12 would not address the professed interest of relieving the vote dilution, much less be narrowly tailored to accomplish this goal. ***517 US 916, 917***

This Court notes that House District 18's predecessor, House District 98, was created in response to the USDOJ's same preclearance Section 5 and 2 review and objections to the 1991 redistricting plan. House District 98, although not precisely aligned with the present, compact, two-county effective minority district of House District 18, was then thought to have been required under Section 2 of the VRA by the USDOJ for southeastern North Carolina. There was no challenge to House District 98 as a Section 2 VRA. Representative Wright was elected in 1992, 1994, 1996, 1998, and 2000 in a district created as a VRA district for purposes of Section 2 of the VRA and to alleviate the objections of the USDOJ under its regulatory scheme. A Section 2 VRA objection from the USDOJ is no longer appropriate to hold up a Section 5 VRA preclearance and has not been a stumbling block since 1996. Here's why.

Prior to the Supreme Court's decision in ***Reno v. Bossier Parish School BD, 520 U.S. 471 (1996)*** the Attorney General's regulations interpreting the VRA required that a proposed redistricting change be free of discriminatory purpose and retrogressive effect (Section 5), but also if the Attorney General concluded that a "bar to implementation of the change is necessary to prevent a clear violation of amended Section 2, the Attorney General shall withhold Section 5 preclearance." 28 CFR Section 51.55(b)(2) (1996).

Section 5 of the VRA freezes election procedures in a "covered jurisdiction" until that jurisdiction proves that its proposed changes do not have the purposes and will not have

the effect of denying or abridging the right to vote based on race.

Reno held, *inter alia*, that pre-clearance under Section 5 may not be denied solely on the basis that the new redistricting plan violates Section 2 of the VRA. In so holding, the Supreme Court struck down the Attorney General's regulation that required Section 5 preclearance to be withheld on the basis of a suspected Section 2 VRA violation. ***Reno***, supra, 520 U.S. 483-485.

"Preclearance under Section 5 affirms nothing but the absence of backsliding." ***Reno v. Bossier Parish School Bd., 528 U.S. 335***

As a consequence of the ***Reno*** decision, at the time of the 2000 census and its required redistricting plans, the USDOJ was no longer able to use its objections to redistricting plans on the basis of perceived Section 2 VRA violations.

Simply put, the USDOJ did not have the jurisdiction or authority under its Section 5 review to pass on or object to the creation of House District 18 or to cloak House District 18 with a mantle of legitimacy as a Section 2 VRA district. Thus, the preclearance of North Carolina's 2003 House Redistricting Plan under Section 5 of the VRA did not provide one iota of cover for House District 18's designation as a VRA district under Section 2.

House District 18 must rise or fall on its ability to stand alone as a Section 2 VRA district and it must be able to meet the Section 2 elements as set forth above.

House District 18

It is undisputed that the General Assembly intended House District 18 to be created as a Section 2 VRA district and that the General Assembly believed that it was required to draw a Section 2 VRA district in the southeastern North Carolina Region in order to comply with Section 2 of the VRA.

Nothing in ***Stephenson I and II*** guarantees any county protection from being divided when necessary to comply with the VRA; one-man, one-vote; or other federal mandates.

The difficulty in analyzing and deciding this case is the posture in which House District 18 presents itself to the Court on two separate grounds:

First, House District 18 was drawn as a "preemptive strike" against legislative concerns that, if a Section 2 VRA effective minority district was not maintained in the southeast to replace former House District 98, then there would be a lawsuit filed challenging the ***absence*** of an effective minority district in southeastern North Carolina on the basis of Section 2 of the VRA.

Having taken the initiative and created House District 18 as a Section 2 VRA district in this preemptive fashion, the BOE is in the unusual position of having to defend its decision as if it had the burden of proving that a Section 2 VRA violation would have occurred, in fact and as a matter of law, in the absence of the creation of House District 18.

Second, House District 18 is ***not*** a majority-minority district because of the number of black voters located therein. House District 18, at best, can be described as an "ability to elect" or "coalition" district. An "ability to elect district" is a district where "minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority with a single district

in order to elect candidates of their own choice." ***Georgia v. Ashcroft, 539 U.S. 461, 481 (2003).***

Pender County's able and competent counsel goes for the jugular on this very point and argues that under the first prong of the ***Gingles*** threshold test as interpreted by the United States Court of Appeals in ***Hall v. Virginia, 385 F.3d 421 (4th Cir.2004),*** a district in which black voters do not form a numerical majority cannot maintain a Section 2 VRA claim in the first place.

> *The district court dismissed the complaint on the grounds that the plaintiffs could not satisfy the requirements established in* ***Thornburg v. Gingles*** *that a minority group seeking relief under Section 2 "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. 30,50 (1986). Because we agree that Gingles establishes a numerical majority requirement for all Section 2 claims, we affirm the order of the district court dismissing the complaint with prejudice."* ***Hall, at p 2. slip op.***

If this Court agrees with the Fourth Circuit's imposition of the first prong of ***Gingles*** as a "bright line" requirement that the minority group seeking Section 2 VRA relief must be a numerical majority, then this case is over and District 18 as presently drawn is "toast" because House District 18 is not a numerical majority black voter district. The easy way out for the Court would be to stop here, run for cover using ***Hall*** for protection, and grant summary judgment. To take such action under the particular facts presented, however, would be a shameful example of judicial

irresponsibility and this Court rejects the carrot dangled by the ***Hall*** decision.

After careful consideration of the undisputed facts pertaining to House District 18 and hours of "eye straining" review of the many United States Supreme Court decisions which followed ***Gingles*** into the murky legal quagmire of Section 2 of the VRA, this Court must respectfully disagree with the Fourth Circuit's imposition of a "bright line" requirement that a minority group seeking Section 2 VRA relief must constitute (literally) a numerical majority of black population and/or black voting age population.

Furthermore, this Court is not bound by a decision of the Fourth Circuit, only by a decision of the United States Supreme Court. **State v. McDowell, 310 N.C. 61, 74 (1984).**

With all due respect, a "bright line test" requiring a voting age majority of minority voters to be present in a single-member district has not yet been etched in stone by the Supreme Court of the United States. Until that day comes, this Court is free to consider the issue of whether or not black voters in House District 18 have the potential, on the strength of their own ballots, to elect candidates of their own choice.

This Court is of the opinion that the first ***Gingles*** precondition for establishing a Section 2 VRA claim – that a minority must be able to constitute a "majority" in a single member district – depends on the political realities extant in the particular district in question, not just the raw numbers of black voters present in the general population of the district.

The proper factual inquiry in analyzing a "coalition" or an "ability to elect district", in our opinion, is not whether or not black voters make up the majority of voters in the single-member district, but whether or not the political realities of the district, such as the political affiliation and number of black registered voters when combined with other

related, relevant factors present within the single-member district operate to make the black voters a ***de facto*** majority that can elect candidates of their own choosing. Put another way, we believe the proper inquiry is whether the black voters in the district possess the political ability, through the voting booth, to elect candidates of their own choice.

As a matter of practical common sense, such an inquiry must focus on the ***potential of black voters to elect representatives of their own choosing*** not merely on sheer numbers alone. Potential is not a "new" word that this Court has plucked out of thin air. Potential has been a frequently used term within the context of Section 2 VRA analysis.

The United States Supreme Court in ***Growe***, supra, at 40, noted that a minority group claiming to have had its voting power diluted in violation of Section 2, must establish that the group "has the ***potential*** to elect a representative of its own choice in some single-member district."

Even in ***Gingles***, potential was used: "[u]nless minority voters possess the ***potential*** to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." ***Gingles***, supra at 50, n.17. (emphasis added.)

Accordingly, in the event that this Court's inquiry reveals that blacks constitute a ***de facto*** majority with the potential to elect candidates of their own choice because of the political realities present in the district, then and in that event the ***de facto*** majority black voters present in the district would be present in sufficient numbers to satisfy the "majority" requirement in ***Gingles***, as that ***de facto*** majority would possess the potential political power to elect a representative of its own choice in House District 18.

This Court concludes that employing a practical, common sense approach to the facts related to House District 18 has support outside of the Fourth Circuit. The United

States Court of Appeals for the First Circuit in the case of ***Metts v. Murphy, 363 F.3d 8 (1st Cir. 2004)*** discussed the first prong of ***Gingles*** and stated:

> *First, several Supreme Court opinions after* ***Gingles*** *have offered the prospect, or at least clearly reserved the possibility that Gingles' first precondition – that a racial minority must be able to constitute a "majority" in a single-member district – could extend to a group that was a numerical minority but had predictable cross-over support from other groups. (citations omitted) "[T]he first Gingles precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume, arguendo, to be actionable today." Further, the Court has so far reserved judgment on a second-cousin question: whether dilution of a minority racial group's influence, as opposed to the power to elect, could violate section 2- a position that would require substantial modification of Gingles' first-prong "majority" precondition. Growe, 507 U.S. at 41, n. 5.*
>
> *Second, where single member districts are at issue – as in our case - opinions have increasingly emphasized the open-ended, multi-factor inquiry that Congress intended for section 2 claims. (citations omitted) To say that Gingles applies as a precondition to section 2 liability may not tell one very much if Gingles itself is no longer to be "mechanically" applied.....*

[2] It is no accident that most cases under section 2 have been decided on summary judgment or after a verdict, and not on a motion to dismiss. This caution is especially apt where, as here, we are dealing with a major variant not addressed in ***Gingles*** *itself- the single member district – and one with a relatively unusual history……*

We are thus unwilling at the complaint stage to foreclose the possibility that a section 2 claim can ever be made out where the African-American population of a single member district is reduced in redistricting legislation from 26 to 21 per-cent. Yes, one would ordinarily expect the consequences to be small, but not always, and arguably not here (based on past history). At this point we know practically nothing about the motive for the change in the district or the selection of the present configuration, the contours of the district chosen or the feasible alternatives, the impact of alternative districts on other minorities, or anything else that would help gauge how mechanically or flexibly the ***Gingles*** *factors should be applied.* ***363 F.3rd 11,12.***

With the foregoing comments in mind, the Court will now examine the undisputed evidence related to House District 18 and determine whether or not House District 18, as presently constituted, is a ***de facto*** black majority district under a Section 2 VRA analysis sufficient to meet the first prong of ***Gingles***.

Past election results in North Carolina demonstrate that districts with a black voting age population (BVAP) of 37.81% and above can provide an effective opportunity for the election of black candidates.

In North Carolina, a ***more important indicator of effective black voting strength is the*** **percentage of registered Democrats who are black.**

Using the 2000 Census data, District 18 had total voter registration total of 38,850. Of this number, Democratic voters comprised 22,960 (59.01%) an overwhelming majority. Republican voters comprised 9,285 (23.99%) and Unaffiliated voters comprised 6,437 (16.57%).

District 18 has a total black population of 27,023 (42.89%), a black voting age population of 19,173 (39.36%) and a black Democratic voter registration of 12,334 (53.72%). With the majority of Democratic voters being black, it is not rocket science to conclude that the candidate in the Democratic primary for House District 18 who will be successful in that primary will be the black Democratic voters' candidate of choice.

The election results for 2004 in District 98 are the proof in the pudding that Representative Wright, a black Democrat, had the best chance of winning the House seat in District 18 because he would win the party primary, if one was held, and face a General Election minority of Republican (23.99%) and/or combination of unaffiliated voters (16.57%) whose combined total was less than 41% of the registered voters in the district.

The fact of the matter is that Representative Wright had no primary opposition and no Republican opposition in the General Election in 2004. The reason no Republican ran is also not rocket science. In the General Election, the Democratic voters, without regard to race, make up 59.01% of the total voters in District 18. It is clear that Representative Wright is the black voters' candidate of choice and that they have, in House District 18, the ability to

elect him to office in the General Election by means of the Democratic primary and the Democratic party.

There has been no evidence presented to contradict these facts from the undisputed evidence in the record, or to call into question the only reasonable conclusion that can be drawn from the present configuration of House District 18: House District 18 is geographically compact and politically cohesive among the registered Democratic voters to be an effective, viable "ability to elect district" that is, a "coalition district" where Democrats vote for the Democratic candidate who wins the party primary and ***a de facto majority*** district for black voters who are able to elect the representative of their choice to the North Carolina House of Representatives.

Accordingly, this Court concludes as a matter of law that House District 18, as presently drawn, contains a black voting age population that is "sufficiently large and geographically compact" so as to constitute a majority in House District 18 which has potential and the proven ability to elect its candidate of choice to the North Carolina House of Representatives.

Representative Thomas Wright is clearly the candidate of choice of black voters in House District 18, as presently constituted, and as well in the previous districts.

This Court therefore concludes as a matter of law that House District 18, as presently drawn, satisfies the first two ***Gingles*** threshold conditions for a Section 2 VRA claim as set out below:

First, that the black voters in House District 18 are a sufficiently large and geographically compact group so as to constitute a majority in the single-member district; and

Second, that the black majority voters are politically cohesive within the majority Democratic party in House District 18 and that within the Democratic party the voters are politically cohesive.

In making these conclusions, the Court has considered all of the undisputed evidence of record, including the prior voting patterns of House District 98 and Interim House District 18, as well as the evidence discussed above relative to present House District 18.

This Court, upon careful consideration of the evidence presently before the Court relating to the third prong of ***Gingles*** – requiring that there be sufficient white majority bloc voting to impair the ability of black voters to elect their chosen representatives – ***Gingles,*** 478 U.S. at 49, n. 15. - is of the opinion that there more likely than not exist genuine issues of material fact on this question.

At the very least, given this Court's determination that the first two prongs of ***Gingles*** have in fact and in law been satisfied with respect to House District 18's qualification as a Section 2 VRA district, it would be in the interests of justice and fair play to provide both sides an opportunity to present evidence on this Third prong and also on the "totality of the circumstances" of Section 2 of the VRA.

This is because proof of the ***Gingles*** preconditions is not alone enough to establish proof that House District 18 is a Section 2 VRA district. "The ultimate determination of vote dilution under the Voting Rights Act still must be made on the basis of the 'totality of the circumstances." ***Lewis v. Alamance County, 99 F. 3d 600, 604 (4th Cir. 1996).***

Reduced to essentials, the Court's decision is as follows:

First, the Court will dismiss Pender County and the plaintiff-commissioners in their official capacities, leaving the individual plaintiffs to prosecute the remainder of this action.

Second, the Court, having declared that House District 18, as presently drawn, meets the first and second ***Gingles*** preconditions, will grant partial summary judgment in favor of the BOE on those issues and will deny Pender County's motion for summary judgment.

Third, the Court, having determined that there are questions of material fact that may be in dispute relating to the racial bloc voting third **Gingles** precondition and that the Court would like to provide the parties an opportunity to focus the evidence on this issue and also on the "totality of the circumstances" required in any Section 2 VRA analysis, will make no ruling affecting those issues and will, after a status conference, schedule an evidentiary hearing on the remaining issues.

Fourth, after hearing evidence on the remaining issues, the Court will resolve any disputes of fact, and enter its final judgment accordingly.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. **That Pender County lacks standing to bring this action against the State of North Carolina defendants and is hereby dismissed as a party to this action.**
2. **That Dwight Strickland, David Williams, F.D. Rivenbark, Stephen Holland, and Eugene Williams, in their official capacities as County Commissioners of Pender County, lack standing to bring this action against the State of North Carolina defendants and they are hereby dismissed, in the official capacities, as parties to this action.**

3. **That Dwight Strickland, David Williams, F.D. Rivenbark, Stephen Holland and Eugene Williams, as indvidual citizens and voters of Pender County, have standing to bring this action and they remain as plaintiff parties to this action.**
4. **That House District 18, as presently constituted, meets the first two (2) threshold tests set out in Thornburg v. Gingles, supra., in that based on the undisputed evidence of record and the law: (1) House District 18 has a black minority population that is sufficiently large and geographically compact as to constitute a *de facto* majority in that single member district and (2) House District 18's black minority group is politically cohesive.**
5. **That the Court has determined that material issues of fact remain in dispute as relates to the third (3) Gingles threshold test relating to whether or not there is "racially polarized voting" and as relates to the "totality of circumstances" as to whether or not the members of the black minority have less opportunity than other members of the electorate to participate in the political process and elect representatives of their own choosing as required under 42 USC 1973(b) to establish a Section 2 VRA district. See Shaw v. Hunt, supra at 517 US 914.**
6. **That Pender County's (Plaintiffs') Motion for Summary Judgment on the grounds that House District 18, as presently constituted, cannot comply with Section 2 of the Voting Rights Act, is denied for the reasons set forth in this Memorandum of Decision and Order.**

7. **That the BOE (State of North Carolina defendants) Motion for Summary Judgment on the grounds that House District 18, as presently constituted, complies with Section 2 of the Voting Rights Act is allowed in part and denied in part for the reasons set forth in this Memorandum of Decision and Order.**
8. **That the Court will conduct a scheduling conference with the remaining parties' counsel within 10 days of the date of this Memorandum of Decision and Order regarding the trial of the remaining issues in this case. It is the intent of this Court that the remaining issues will be set for an evidentiary hearing in the first part of January. 2006.**

This the 2nd day of December, 2005.

/s/ W. Erwin Spainhour H. E. Manning, Jr. Quentin T. Sumner

Three-Judge Panel for Redistricting Challenges G.S.1-267.1

Certificate of Service

This is to certify that a copy of the foregoing Memorandum of Decision and Order Re: Summary Judgment was served this date on counsel for the parties

by facsimile as permitted by the North Carolina Rules of Civil Procedure as follows:

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This the 2d day of December, 2005.

/s/ Howard E. Manning, Jr.
Superior Court Judge

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Nos. 05-204, 05-254, 05-276, 05-439

IN THE

Supreme Court of the United States

EDDIE JACKSON; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; TRAVIS COUNTY; GI FORUM OF TEXAS,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

On Appeal from the United States District Court of the Eastern District of Texas

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BRIEF OF *AMICI CURIAE* PROFESSORS GARY KING, BERNARD GROFMAN, ANDREW GELMAN, AND JONATHAN N. KATZ, IN SUPPORT OF NEITHER PARTY

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INTERESTS OF *AMICI CURIAE*

Amici are professors of political science, government, and statistics who have written, published, and testified about partisan bias in redistricting.[1] They have testified on behalf of States and of private parties. They have testified in favor of Democratic plans in some instances and in favor of Republican plans in others. They have written and published extensively on the subjects of voting rights and statistical methods and more specifically on redistricting. And they have won numerous prizes and awards for their work in this area. *Amici* take no position on whether the Texas redistricting plan at issue in this case is unconstitutional. Rather, they write to explain that an "agreed upon substantive principle[] of fairness in districting" exists. *Vieth v. Jubelirer*, 541 U.S. 267, 312-13 (2004) (Kennedy, J., concurring in the judgment).

Amicus Gary King (http://gking.harvard.edu) is the David Florence Professor of Government and the Director of the Institute of Quantitative Social Science at Harvard University. He has been elected Fellow of the American Association for the Advancement of Science, Fellow of the American Academy of Arts and Sciences, Fellow of the American Academy of Political and Social Science, President of the Society for Political Methodology, and Vice President of the American Political Science Association. Along with Andrew Gelman, he wrote the software program JudgeIt, which is a widely-used tool for measuring partisan bias in districting plans.

Amicus Bernard Grofman (http://www.socsci.uci.edu/~bgrofman/) is Professor of Political Science at the University of California, Irvine. He has been elected Fellow of the

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel has made a monetary contribution toward its preparation or submission. By letters filed with the Clerk, counsel for all parties have consented to this filing.

American Academy of Arts and Sciences and President of the Public Choice Society. This Court cited his work in *Thornburg v. Gingles*, 478 U.S. 30, 52-53 & n. 20 (1986), and both this Court and other federal courts have cited his research on racial voting patterns and other topics related to elections.

Amicus Andrew Gelman (http://stat.columbia.edu/~gelman/) is Professor of Statistics and Professor of Political Science at Columbia University. He has been elected Fellow of the Institute of Mathematical Statistics and Fellow of the American Statistical Association, and is the founding director of the Quantitative Methods in the Social Sciences program at Columbia. As noted, he and Gary King wrote the software program JudgeIt.

Amicus Jonathan N. Katz (http://jkatz.caltech.edu/) is the Co-Director of the Caltech/MIT Voting Technology Project. He is Professor of Political Science at the California Institute of Technology and Director of Graduate Studies for the Social Sciences. He is also currently a Fellow at the Center for Advanced Study in the Behavioral Science at Stanford University. He is on the editorial boards of *Political Analysis*, *Political Research Quarterly*, and the *American Journal of Political Science*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the partisan gerrymandering context, this Court has not adopted any governing rule to determine whether a plan is unconstitutional. The Court may or may not choose to do so in this case. If the Court chooses to do so, however, a principle known as the symmetry standard presents a "substantive definition of fairness in districting" that "command[s] general assent." *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment). The symmetry standard compares how similarly-situated political groups would fare hypothetically if they each (in turn) receive the

same given percentage of the vote. The difference in how parties would fare in terms of legislative seats is the "partisan bias" of the electoral system.

While *amici* take no position on whether this Texas plan is constitutional, the ability to measure partisan bias using objective and neutral criteria allows this Court to determine when a particular plan crosses the constitutional threshold. Three potential approaches are (1) a rule that creates as little partisan bias as possible; (2) a rule that prevents a political party from gaining a seat to which it otherwise would not be entitled; or (3) a rule prohibiting egregious gerrymanders that show a bias over a certain percentage.

ARGUMENT

I. THE "SYMMETRY STANDARD" DEFINES PARTISAN FAIRNESS IN LEGISLATIVE REDISTRICTING

"The object of districting is to establish 'fair and effective representation for all citizens.'" *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565-68 (1964)). This Court and other courts consistently determine whether States have crossed the constitutional line by drawing districts in a manner that impermissibly burdens one group or another. In the racial context, for example, courts have examined the shape and appearance of district lines in order to resolve whether a State was engaging in a racial gerrymander. *See, e.g, Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Shaw v. Reno*, 509 U.S. 630 (1993).

In the partisan gerrymandering context, dissenting Justices have proposed examining a variety of criteria such as shape, compactness, contiguity, and respect for political subdivisions in order to determine whether a plan unconstitutionally burdens a particular group. *See, e.g., Davis v. Bandemer*, 478

U.S. 109, 165 (1986) (Powell, J., dissenting) (looking to the "configurations of districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of districting"); *Vieth*, 541 U.S. at 335 (Stevens, J., dissenting); *id.* at 347-48 (Souter, J., dissenting). While all of these criteria may have some value, they are simply proxies for determining what is normally the fundamental issue in partisan gerrymandering cases: whether a districting plan unfairly burdens the representational rights of a particular political group.

As this Court has recognized, because criteria such as compactness and traditional political boundaries are merely proxies, they do not provide judicially-manageable standards that courts can apply in politically-neutral and even-handed ways. *See, e.g., Vieth*, 541 U.S. at 307-309 (Kennedy, J., concurring in the judgment); *id.* at 289-90 (plurality opinion); *id.* at 359-60 (Breyer, J., dissenting); *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring in the judgment). In addition, as legislators employ more and more sophisticated tools for redistricting, they can comply quite easily with some of these criteria while still burdening the right to fair and effective representation through political gerrymandering. *Cf. Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) (recognizing that technology gives parties even more "temptation to use partisan favoritism in districting").

In evaluating political fairness, social scientists do not use proxies to measure the existence and extent of partisan bias. Instead, they have defined a clear and appropriate standard for what constitutes partisan fairness. It is called the symmetry standard. The symmetry standard was not before the Court in *Vieth*, 541 U.S. at 267.

The symmetry standard measures fairness in election systems, and is not specific to evaluating gerrymanders. The symmetry standard requires that the electoral system treat similarly-situated political parties equally, so that each

receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage. In other words, it compares how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote. The difference in how parties would fare is the "partisan bias" of the electoral system. Symmetry, however, does not require proportionality.

For example, suppose the Democratic Party receives an average of 55% of the vote total across a state's district elections and, because of the way the district lines were drawn, it wins 70% of the legislative seats in that state. Is that fair? It depends on a comparison with the opposite hypothetical outcome: it would be fair only if the Republican Party would have received 70% of the seats in an election where it had received an average of 55% of the vote totals in district elections. This electoral system would be biased against the Republican Party if it garners anything fewer than 70% of the seats and biased against the Democratic Party if the Republicans receive any more than 70%.

In other words, the symmetry standard is that "each political group in a State [has] the same chance to elect representatives of its choice as any other political group." *Davis v. Bandemer*, 478 U.S. at 124. The symmetry standard is a "clear, manageable, and politically neutral" measure of "the particular burden a given partisan classification imposes on representational rights." *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring in the judgment). The symmetry standard can be used in all types of election systems and districting arrangements, such as single-member districts, multimember districts, or any other valid electoral rule. Moreover, it works regardless of the number of parties that field candidates. *See, e.g.*, Gary King, *Electoral Respons-*

iveness and Partisan Bias in Multiparty Democracies, 15 Leg. Stud. Q., 159, 163-65 (1990).[2]

The symmetry standard has been the subject of scholarly work for at least three decades. *See, e.g.*, Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*. 67 Am. Pol. Sci. Rev. 540 (1973); Bernard Grofman, *Measures of Bias and Proportionality in Seats-Votes Relationships*, 9 Am. Pol. Sci. Rev. 295, 327 (1983); Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 Am. J. Pol. Sci. 514 (1994). The scholarly literature has been united in supporting the symmetry standard as the definition of partisan fairness in electoral systems at least since the clarification of the standard introduced by Gary King and Robert X. Browning in *Democratic Representation and Partisan Bias in Congressional Elections*, 81 Am. Pol. Sci. Rev. 1251 (1987). *See, e.g.*, Dennis Thompson, *Election Time: Normative Implications of Temporal Properties of the Electoral Process in the United States*, 98, Am. Pol. Sci. Rev. 51, 53 n. 7 (2004); Thomas W. Gilligan & John G. Matsusaka, *Structural Constraints On Partisan Bias Under The Efficient Gerrymander*,

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[2] Indeed, the symmetry standard is itself a reflection of fundamental American tenets such as fairness and equality of treatment. It stems from the same principle that drives the belief that the legislative candidate with the most votes in a district should win the seat. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."). In particular, elections are "fair" when they set objective and symmetrical guidelines for determining who wins: One candidate can win with a plurality of votes because if another candidate had received a plurality of votes instead, that other candidate would have won the seat. Fairness exists because the political process treats each candidate equally. The symmetry standard takes this same principle and applies it to political groups at the statewide level.

100 Pub. Choice 65, 65 (1999); Ernesto Calvo & Maria Victoria Murillo, *Who Delivers? Partisan Clients in the Argentine Electoral Market*, 48 Am. J. Pol. Sci. 742, 747 (2004); Erik J. Engstrom & Samuel Kernell, *Manufactured Responsiveness: The Impact of State Electoral Laws on Unified Party Control of the Presidency and House of Representatives, 1840-1940*, 49 Am. J. Pol. Sci. 531, 541 (2005). In short, "[s]cholars have reached near consensus on *partisan symmetry* as a standard of partisan fairness and have made great progress on developing measures that can be used to see whether electoral systems and districting plans meet this standard." Gary King, John Bruce & Andrew Gelman, *Racial Fairness in Legislative Redistricting*, in *Classifying by Race* 85, 85 (Paul E. Peterson, ed., 1996).

The symmetry standard also is a regular feature of expert testimony in redistricting litigation. Experts representing both political parties use it, as do neutral officials such as courts and non-partisan members of redistricting commissions. Indeed, in this very litigation, experts from both sides used the symmetry standard to ascertain whether the plan was biased. *See* Expert Report of John R. Alford at 26-27 & Graph 2, Jackson Pls. Exh. 44 (Expert for Plaintiffs); Expert Report of Ronald Keith Gaddie, Jackson Pls. Exh. 141 at 18-22 & Fig. 1 (Expert for the State); Gaddie Report at 18 (noting that the three-judge panel which drew the non-partisan map in 2001 measured partisan bias by using the approach "widely accepted by the experts involved in this matter, and it is the approach used here to facilitate comparison").

Measuring symmetry and partisan bias does *not* require "proportional representation" (where each party receives the same proportion of seats as it receives in votes). Of course, an electoral system that is proportional, like any electoral